Supreme Court of the United States.

OCTOBER TERM 1921.

No. 150

ST. CLOUD PUBLIC SERVICE COMPANY,
Appellant,

vs.

CITY OF ST. CLOUD,
Appellee.

Brief on Behalf of Appellant.

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Supreme Court of the United States.

OCTOBER TERM 1921.

No. 472.

ST. CLOUD PUBLIC SERVICE COMPANY,

Appellant,

vs.

CITY OF ST. CLOUD,

Appellee.

Brief on Behalf of Appellant.

STATEMENT.

This is an appeal from a final decree of the United States District Court, District of Minnesota, Sixth Division, dismissing the bill for want of equity and denying appellant's motion for a preliminary injunction (see Decree, p. 162). The appellant will be hereinafter referred to as the complainant and the appellee as the defendant.

The complainant is a public service corporation organized under the laws of the state of Minnesota, and among other things is engaged in the business of supplying the city of St. Cloud, Minnesota, and its inhabitants with fuel gas.

The charter of the defendant city was originally

contained in a special act of the legislature of Minnesota, approved March 8, 1862, and an act approved March 6, 1868, and acts amendatory thereto. These acts were consolidated by an act approved April 13, 1889, Special Laws 1889, Chapter 6. This act is entitled, "An act to consolidate in one act the charter of the city of St. Cloud and to amend the same." The act is divided into chapters. Section 1, Chapter 1, of the act provides that the city

> "shall be a municipal corporation, by the name of the 'city of Saint Cloud'; * * * shall be capable of contracting and being contracted with; and shall have all the powers possessed by municipal corporations at common law, and in addition thereto shall possess all powers hereinafter granted. * * *"

Section 4 of Chapter 4 of the act provides:

> "Sec. 4. The common council in addition to all powers herein contained and specifically mentioned, shall have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify and repeal and amend all such ordinances, by-laws, rules and regulations, for the government and good order of the city, for the suppression of vice and intemperance; for the prevention of crime, and for the general welfare of the city and the inhabitants thereof, as they shall deem expedient. * * *"

Section 5 of Chapter 4 of the act provides:

> "The common council shall have full power by ordinance: * * *
>
> 10th. * * * * To provide for and control the erection and operation of gas works, elec-

tric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporation, and to control the erection and operation of such works and laying of pipes, mains, and wires into, through and under the streets, avenues, alleys and public grounds of said city, and the erection of poles and mainstays, and the stringing of wires thereon, over, in, upon, and across the streets, alleys and public grounds; to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works, and the laying of mains into, through, and under the streets, alleys, and public grounds of said city; provided, that every grant to a company or corporation of the right to erect or maintain any of said works shall provide that the city or its successors may purchase the same at such time and in such manner as shall be prescribed in the grant; and provided further, that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned."

Subdivision 34 of Section 5, Chapter 4, of the act:

"34th. To regulate and control the quality and measurement of gas. To prescribe and enforce rules and regulations for the manu-

facture and sale of gas, the location and construction of gas works, and the laying, maintaining and repairing of gas pipes, mains and fixtures to provide for the inspection of gas and gas meters, and to appoint an inspector if needed and to prescribe his duties."

Section 7, Chapter 14, of the act provides:

"Sec. 7. No law of the state concerning the provisions of this act, shall be considered as repealing, amending, or modifying the same, unless said purpose be expressly set forth in such law" (see memorandum of trial judge, pp. 150, 151.)

The defendant operated under this charter until November 28, 1911, when it adopted a home rule charter under the provisions of law of the state of Minnesota governing the adoption by municipalities of home rule charters. The latter charter contained the same powers as those hereinbefore recited as being contained in the Special Laws of 1889 (R., p. 27).

On the 19th day of December, 1905, defendant's common council granted to plaintiff's predecessor an ordinance entitled, "An ordinance granting the right to acquire, construct, maintain and operate works for the production, manufacture and sale of electricity and for the manufacture and sale of gas in the city of St. Cloud, Minn."

Sections 5 and 6 of the ordinance read as follows:

"Section 5. In consideration of the rights and privileges herein granted, the grantee hereby covenants and agrees that it will prior

to the first day of January, A. D. 1907, erect or cause to be erected in the city of St. Cloud, an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard now manufactured therein.

Section 6. The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed, of a standard of fourteen candle power at the price of not to exceed one dollar and 85/100 ($1.85) per thousand cubic feet, and fuel gas at the rate of not to exceed one and 35/100 dollars ($1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days" (R., pp. 2 and 3).

The bill challenged the ordinance rate for fuel gas (no other kind of gas being sold by complainant), as confiscatory and non-compensatory and a taking of complainant's property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

The amended bill alleges (pp. 5-17) that immediately after the passage of said ordinance the grantee therein named erected an efficient coal and water gas generating system in the defendant city of ample capacity and finished the erection thereof within the time specified by Section 5 of the ordinance and until the 17th day of August, 1915, was

continuously engaged in the business of generating, selling and distributing fuel gas to the defendant and to its inhabitants of the standard demanded by said ordinance through and by means of said generating plant. That on the 17th day of August, 1915, the grantee named in the ordinance sold and conveyed all of its property in the defendant city (including its electric plant and its said gas generating plant) to complainant and at the same time assigned and transferred to the complainant the ordinance before mentioned and all the grantee's right, title and interest therein and thereto and that since said last mentioned date complainant has been manufacturing, selling and distributing fuel gas to the defendant and to its inhabitants under said ordinance using and employing for that purpose the said generating plant before mentioned.

The amended bill further alleges that at the time of the filing of the original bill and for a long time prior thereto, and at the time of the filing of the amended bill the fair and reasonable value of the complainant's property owned by it, used and useful for the manufacture and distribution of gas to the defendant and its inhabitants was a sum in excess of $444,000. The amended bill then alleges the actual cost year by year up to August 31, 1920, of its gas manufacturing plant showing that on said last mentioned date its actual cost was the sum of $194,057.03.

In paragraph 9 of the bill it is stated that of the above amount the sum of $29,875.54 and no more represented the value of complainant's gas prop-

erty in the defendant city installed and in use prior to the passage and approval of the ordinance hereinbefore mentioned. That some of the property represented by said sum of $29,875.54 is still in use.

The bill further alleges that the cost item of $194,057.03 did not include any of the following overhead charges:

(a) Interest during construction.

(b) Taxes or insurance.

(c) Discount on bonds.

(d) Any of the expenses incurred by the president and paid out by him on various trips to Chicago and Minneapolis in arranging with engineers, selling of bonds, buying of materials, etc.

(e) No charge for bookkeeping or office rent and no charge for general superintendence of the president or manager during construction.

The bill alleges that complainant's properties are well located, planned and have been economically constructed. That they have always been well and economically and efficiently managed and they have always been and still are maintained in a first class condition so that the defendant and its inhabitants have always been furnished with proper and adequate gas service.

It is further charged in the bill that all of the expenses of complainant in the management and operation of its said gas business and those of its predecessor have been reasonable and have been as low in amount as could be made by economical management; the services of all officers, agents and employes have been secured as cheaply as prac-

ticable for good service and neither it nor its predecessor has ever had more of such officers, agents and employes than have been necessary for the proper conduct of said gas business in an efficient, proper and satisfactory manner.

The bill then alleges and shows the net earnings of the complainant and its predecessor from its gas business year by year commencing with the year ending December 31, 1908, and ending December 31, 1916.

The bill then alleges that for the year ending December 31, 1917, there was an actual operating deficit of $3,938.31; and for the year ending December 31, 1918, an actual operating deficit of $15,897.40; and for the year ending December 31, 1919, an operating deficit of $21,129.80; and for the eight months ending October 31, 1920, an actual operating deficit of $18,889.20.

The bill then alleges that the losses in operation above referred to were not due to any fault or neglect on the part of the complainant, but were due solely to the conditions arising out of the world war and the enormous increase in the cost of labor and of materials which entered into the manufacture of complainant's gas.

The bill then shows the net rates to consumers of gas and that since the first day of March, 1918, all gas has been sold at the ordinance rate of $1.35 per thousand cubic feet.

The bill then alleges that the gas and electric operations of complainant and of its predecessor, the grantee named in the ordinance, as well as all

the operations of its street railway have always been and are now conducted as distinct and separate departments.

Tabulated statements are attached to the bill showing the prices paid by complainant for the coal, the coke and the oil used by it in the manufacture of its gas and the increase in such prices.

The bill further charged that according to the last state census for the year 1905 the defendant had a population of 8,866; and that on the 30th day of September, 1920, complainant had in use only 1,265 gas meters.

It was further alleged that the maximum rate fixed for the price of gas in the ordinance described in paragraph 4 hereof has never yielded to complainant or its predecessor a fair or reasonable return on the value of its property used and useful in said gas business; nor taking the whole term prescribed and fixed by said ordinance, assuming that the defendant never exercises the right to purchase complainant's gas plant as provided therein, or whether it does so or not, can the complainant ever make any fair or reasonable return on the value of its said property necessarily used and employed by it in its said gas business, nor as a matter of fact any return whatsoever.

It was further alleged that under the Constitution and laws of the state of Minnesota the defendant is a city of the fourth class. That on the 31st day of August, 1920, complainant presented to the commission of the city of St. Cloud a petition, a copy of which marked Exhibit "D" is hereto at-

tached and hereby made a part of the amended bill. That under the home rule charter of the city of St. Cloud said commission is the body to whom such petition should have been submitted. This petition was presented pursuant to Chapter 469 of the Session Laws of Minnesota for the year 1919. This act is as follows:

> "AN ACT TO EMPOWER ANY CITIES OF THE THIRD AND FOURTH CLASSES IN THE STATE OF MINNESOTA, WHETHER EXISTING UNDER A SPECIAL OR GENERAL LAW, OR UNDER A HOME RULE CHARTER, TO PRESCRIBE REASONABLE RATES UNDER WHICH PUBLIC SERVICE CORPORATIONS SUPPLYING GAS OR CURRENT FOR ELECTRIC LIGHTING OR POWER PURPOSES AND OCCUPYING THE STREETS AND PUBLIC PLACES OF ANY SUCH CITY MAY OPERATE WITHIN ANY SUCH CITY.
>
> Be it enacted by the legislature of the state of Minnesota:
>
> Section 1. RATES FOR GAS OR ELECTRIC CURRENT TO BE PRESCRIBED BY CITY COUNCIL.—That in addition to all other powers now conferred upon any cities of the third and fourth classes in the state of Minnesota, whether existing under a general or special law or under a home rule charter, any such city is hereby authorized and empowered, through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service. Provided, that nothing herein shall be construed to impair

the obligation of any contract or franchise provision now existing between any such city and any such public service corporation. It shall be the right and duty of any such council or governing body to prescribe a rate which shall permit any such corporation to make a reasonable return on the capital investment in the business, under an economical and efficient management of the same; and for the purpose of making such determination it shall be the duty of any such corporation, upon request by said council or other governing body, to give to any such council or other governing body or any authorized agent of such council or other governing body access to the books of any such corporation for the obtaining of such information as may be necessary and proper in the making of such determination. Provided, that in any case where any such corporation supplies gas or current for lighting or power purposes to customers outside the limits of any such city, any such city council in fixing the rates to be charged shall take into consideration the effect of such rates, if any, upon the rates to be charged to such customers living outside the limits of such city, but said city council shall not have power to fix the rates of customers supplied outside of the city limits.

Sec. 2. HEARING ORDERED. — Such rates shall be prescribed only after hearing and twenty days' notice of the time and place of such hearing shall have been given to such public service corporation, which notice shall be served in the manner prescribed by law for the service of summons in District Court. Such proceedings may be instituted by the council or other governing body of said city or upon petition of any such public service corporation, or upon petition of twenty-five

per cent of the customers served by such corporation within such city, and failure on the part of such council or other governing body to make a determination as to such rates within sixty days after such petition is filed with the clerk of said city shall be deemed a denial of such petition and a determination adverse to such petitioners, provided, however, that such council or other governing body of such city shall not be required to act upon the petition of any such public service corporation which shall refuse to give such council or other governing body access to the books of such corporation and other information relative to the operation of the business of such corporation necessary and proper to the determination of such rates. In case of the failure or refusal of any such public service corporation to give to such council or other governing body access to the books of such corporation or other information relative to the business of such corporation necessary and proper for such a determination such council or other governing body may proceed to determine and prescribe such rates upon such information and evidence as may be adduced at such hearing. The words 'public service corporation' as used in this act shall be construed to include any person, co-partnership or corporation supplying gas or electric current for lighting or power purposes to the public within any such city.

Sec. 3. RIGHT OF APPEAL.—Any such city, public service corporation or person aggrieved by any such determination of rates shall have the right of appeal from such determination to the District Court of the county in which such city, or any part thereof, is situate, at any time within twenty days after the filing of determination with the clerk of such

city. Said appeal shall be made by filing with the clerk of such city a written notice of appeal specifying the determination of such council or other governing body from which the appeal is taken. Thereupon such city clerk shall make out and file with the clerk of such District Court a copy of the determination of the council or other governing body from which such appeal is taken and of the notice of appeal, certified by such clerk to be true copies thereof, and shall transmit and file with the clerk of said court all papers in the case upon which such determination was made. There shall be no pleadings upon such appeal and the only question that shall be passed upon or considered shall be whether the rates prescribed by the determination of such council or other governing body of such city were fair and just to such public service corporation and the consumers and would permit such public service corporation a fair and reasonable return on the capital investment in the business under an economical and efficient management of the same. Such appeals shall have precedence over all other civil cases, except tax cases, and during the pendency of such appeal and until final determination of such appeal by the courts, the rates fixed and prescribed by such council or other governing body shall be and remain in force.

Sec. 4. This act shall take effect and be in force from and after its passage.

Approved April 25, 1919."

It was further alleged that on the 28th day of September, 1920, said petition was rejected by said commission without any consideration thereof upon the merits, but solely upon the ground that said commission had no jurisdiction to entertain

such a petition.

It was again re-alleged that no time since the passage and approval of the ordinance has the maximum rate to be charged for gas to be fixed therein been adequate or sufficient to pay complainant's necessary operating expenses or that of its predecessor in the manufacture and distribution of its gas and yield a fair or reasonable return on the fair value of said property necessarily devoted to said gas business and to public use; that since the first day of January, 1917, said maximum rate has not been adequate or sufficient to even pay said complainant's operating expenses necessarily expended in the operation of its said gas business.

It was further charged that in order to pay its necessary operating expenses complainant must have at least a rate of $1.90 per thousand cubic feet and in order to pay its operating expenses and to secure a fair and reasonable return on the fair value of its property necessarily devoted to its gas business, a rate of $3.39 per thousand cubic feet is necessary, and that complainant intends to increase its said present rate to said price of $3.39 per thousand cubic feet.

The bill further charged that said present maximum rate fixed by said ordinance is inadequate and confiscatory, the effect of which is to deprive complainant of its property without due process of law and to take it for public use without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

It was further alleged that unless the defendant

is enjoined and restrained from so doing it will attempt to force complainant to continue to sell its gas at the maximum rate prescribed by said ordinance and any interference with the collection of such increased rate which complainant proposes to charge will deprive it of its property without due process of law and take it for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States.

It was further alleged that controversies, confusion, risks and multiplicity of suits will result from the resistence of the complainant to the enforcement of the said inadequate and confiscatory rates prescribed in said ordinance.

The bill further alleged that if the defendant should temporarily interfere (as it will do and as it threatens to do unless it is enjoined and restrained from so doing as hereinafter prayed) with the collection by complainant of its said proposed increased rate, the effect thereof would be to deprive complainant of its property, without due process of law and to take it for public use without just compensation, in violation of said amendment to the Constitution of the United States, and would result in inflicting great and irreparable loss and injury on complainant, all in violation of complainant's rights respecting the subject matter of the action, and any judgment of the court entered herein would be thereby rendered ineffectual.

The prayer of the bill was that the court adjudge and decree that the maximum rate to be charged

by complainant for its gas fixed by said ordinance is confiscatory and non-compensatory and to force complainant to continue to sell its gas at said rate would be to deprive it of its property without due process of law and to take it for public use without just compensation, in violation of the amendments to the Constitution of the United States.

That a permanent injunction be issued against the defendant, its city council and all of its officers, agents, attorneys, representatives and departments, restraining and enjoining them and each of them from in any manner, by ordinance or otherwise, interfering with the complainant in raising the rate to be charged for its gas to the sum of $3.39 per thousand cubic feet; or from instituting or authorizing or directing any suit or suits, action or actions, or any proceeding whatsoever against the complainant, the object or purpose of which was to interfere with and restrain or enjoin the complainant from putting into effect said increased rate, or from attempting to force complainant to continue to sell its gas at the rates prescribed by said ordinance; and the bill prayed for a temporary or preliminary injunction restraining and enjoining the defendant, the city council, its commission, and all of its officers, etc., in each of the particulars aforesaid.

Upon the bill and upon the affidavits of A. G. Whitney (pp. 34-36), George F. Grotte (pp. 36-41), A. J. Luick (pp. 41-51) and W. A. Durst (p. 53), an order to show cause was issued to the defendant

why the preliminary injunction prayed for in the bill should not be granted (pp. 56-58). Defendant filed a motion to dismiss the action upon each and all of the following grounds:

1. That it conclusively appears that the complainant is furnishing gas service to the defendant and its inhabitants in compliance with the terms of a contractual ordinance limiting the maximum cost of fuel gas to the sum of $1.35 per thousand cubic feet of gas, and that complainant is bound by said contractual ordinance.

2. For want of equity in said action.

3. That no federal question is involved in said action.

4. That the court has no jurisdiction in said cause (p. 112).

The motion for an injunction was denied (p. 141) and the one to dismiss the bill was granted (p. 142). It is apparent from the memorandum of the learned judge in the court below that the motion for an injunction was not heard upon its merits (p. 142).

It is apparent, also, from the memorandum, that the court below held that there was a federal question involved in the action and that it had jurisdiction, but granted the motion to dismiss solely on the grounds stated in subdivisions (1) and (2) of said motion.

Complainant's showing of facts was sufficient not only to justify but to require a finding that the rate in question was too low and confiscatory. The decree dismissing the bill rests solely upon the hold-

ing of the court that complainant is bound by contract to furnish gas during the 30 year life of the contract at the ordinance rate whether compensatory or not.

SPECIFICATIONS OF ERROR.

1. It was error for the District Court to hold that the defendant city of St. Cloud had the power to enter into the contract providing for the maximum rate for gas as contained in Section 6 of Ordinance No. 160 of the city council of the city of St. Cloud, being the ordinance described and set forth in the bill of complaint and answer herein.

2. It was error for the District Court to hold that there was in fact a contract made between the said defendant city of St. Cloud and plaintiff's predecessor mentioned in the bill of complaint and answer herein, as to rates for gas by the passage and acceptance of said Ordinance No. 160.

3. It was error for the District Court by its order to deny plaintiff's motion for a preliminary injunction against the defendant, its commission and officers, restraining them from in any manner interfering with the plaintiff in raising the rate to be charged for fuel gas in the city of St. Cloud to the sum of three and 39/100 dollars ($3.39) per thousand cubic feet, or from instituting any suit against plaintiff to interfere with it in putting into effect said rate or from attempting to force plaintiff to sell fuel gas at the rate prescribed in the ordinance set forth in the bill of complaint.

4. It was error for the District Court by its order to grant defendant's motion to dismiss the bill of complaint for want of equity.

5. It was error for the District Court by its final decree to dismiss plaintiff's bill of complaint for want of equity.

6. It was error for the District Court by its final decree to deny plaintiff's motion for said preliminary injunction.

ARGUMENT.

The City of St. Cloud Had No Power Under Its Charter to Make an Irrevocable and Inviolable Contract Covering a Term of Years With Respect to Gas Rates.

The rights, privileges and franchises granted by the ordinance set forth in the bill expire on the 1st day of December, 1935 (p. 3). The ordinance was approved December 9, 1905 (p. 5). The ordinance term then was for practically thirty years.

At the outset it is to be noted that the defendant's charter did not confer upon it power to "agree" as to rates or to "make any agreement" respecting rates, but the grant was "that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned" (p. 20).

Section 6 of the ordinance contains the provision with respect to rates and reads as follows:

> "The grantee is hereby authorized to sell illuminating gas when the works therefor shall

> have been completed, of a standard of fourteen candle power, at the price of not to exceed one and 85/100 dollars ($1.85) per thousand cubic feet and fuel gas at a rate of not to exceed one and 35/100 dollars ($1.35) per thousand cubic feet, and the grantee shall be at liberty to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days."

The learned judge who disposed of the case in the court below ruled that the common council of the city of St. Cloud had the power to prescribe maximum rates for the entire term of the ordinance and

> "there is a valid and subsisting contract between the city and the plaintiff company governing the matter of maximum rate for fuel gas, and since there is no showing that the contract was not fairly entered into, or any fraud or misrepresentation, that a court of equity cannot grant the relief asked for plaintiff" (p. 161).

This appeal challenges that ruling.

The surrender, by contract, of a power of government, is a very grave act, and the surrender itself, as well as the authority to make it must clearly and unmistakably appear. Specific authority is required.

Home Telephone Co. v. City of Los Angeles, 211 U. S. 265, was an appeal from the Circuit Court of the United States for the Southern District of California, sustaining a demurrer to the bill in a suit to restrain the enforcement of municipal ordinances fixing telephone rates. The ordinances complained of were enacted by virtue of the powers

contained in the city charter of Los Angeles, which among other things conferred upon the council the power "to regulate telephone service and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections." The company insisted that the city had contracted with it that it might maintain the charges for service at a specified standard and that as the rates prescribed in the ordinances complained of were less than that standard, the ordinances impaired the obligation of the contract, in violation of the Constitution of the United States. The court said:

> "Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made?"

The court then proceeded to answer the first question in the negative and said:

> "The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state), has the authority to make such a sur-

render, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point (p. 273).

It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural persons) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

The court then proceeds to quote the provisions of the charter of the city of Los Angeles, and said:

"The charter gave to the council the power 'by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental

power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject. Those relied on for that purpose are printed in the margin" (p. 274).

The court also said:

"It is urged that though authority to contract for the maintenance of rates is not expressed in the act, it is necessarily implied from these provisions. But we are of the opinion that there is no such necessary implication, even if anything less than a clear and affirmative expression would be sufficient foundation upon which to rest an authority of this nature. The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract. In *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736, the contract was in specific terms ratified and confirmed by the legislature. In *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, the contract was made in obedience to an act of the legislature that the rates should be 'established by agreement be-

tween said company and the corporate authorities.' The opinion of the court, after saying (p. 382), 'it may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare,' pointed out (p. 386) that 'it was made matter of agreement by the express command of the legislature.' In *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as 'comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated.' In *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513, precisely the same authority appeared. In *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, the court said (p. 508): 'The grant of legislative power upon its face is unrestricted, and authorizes the city "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." ' Moreover, in this case the construction of the Supreme Court of Mississippi of its own statutes was followed. On the other hand, it was held in *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, that two acts of the legislature, passed on successive days, authorizing municipalities to 'contract for a supply of water for public use for a period not exceeding thirty years,' and to authorize private persons to construct waterworks 'and maintain the same

at such rates as may be fixed by ordinance, and for a period not exceeding thirty years,' did not confer an authority upon the municipality to contract that the water company should be exempt from the exercise of the governmental power to regulate rates. In this case, too, the construction of the highest court of the state was followed. See *Rogers Park Water Co. v. Fergus, supra.* All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied" (p. 276).

In *San Antonio Public Service Co. v. City of San Antonio,* 257 Fed. 467, it appeared that the city on March 28, 1918, passed an ordinance prohibiting any public utility company from raising its rates without first obtaining the consent of the city so to do. The company thereafter sought consent to raise its fare to six cents per passenger which was denied by the city in October, 1918, by an ordinance prohibiting a fare charge in excess of five cents, and imposed a penalty of misdemeanor by fine and forfeiture of franchise right for any violation.

Thereupon, the company filed the bill alleging that the enforcement of the ordinance prevented

it from increasing its rates and forced it to dedicate its property to public use, depriving it thereof without due process of law, in violation of the Constitution of the United States.

The prayer of the bill, among other things, was that the city be enjoined from carrying into effect the provisions of the two last mentioned ordinances. The city moved to dismiss the bill because it appeared on the face thereof that the complainant as successor to the San Antonio Traction Company was obligated to transport passengers for a five cent fare and that such ordinance constituted, in effect, a valid contract between the company and the city, and hence, that the city in refusing to permit the company to raise its fare could not be a taking of its property without due process of law. The ordinance under consideration provided:

> "Said street car companies shall charge five cents fare for one continuous ride over any of their lines, with one transfer to or from either line to the other."

The charter provision in effect at the time this ordinance was granted gives power "exclusively to prevent, control and regulate everything connected with city railroads and to make such rules and regulations for the same as the city council may deem necessary." The court said:

> "The power to 'regulate everything connected with city railroads' thus unrestricted would include authority to contract for and fix rates, were it not for the bar interposed by the provisions of Section 17 of the Bill of Rights of the Constitution of 1876, declaring that no ir-

> revocable grant of special privilege or immunity be made, but should be subject to legislative control. The grant of a right to a city railroad to charge a fixed sum as a passenger fare during the life of its franchise is an irrevocable grant of special privilege expressly prohibited by the Constitution."

The court also held that there was no contract created by the ordinance of 1899 under the rule established in *Home Telephone Co. v. Los Angeles.*

The motion to dismiss was overruled.

After the entry of the final decree the case was appealed to this court (*City of San Antonio, et al., v. San Antonio Public Service Co.*, decided April 11, 1921). ————U. S.————

It appears from the opinion delivered by the late chief justice that after the motion to dismiss was overruled, the city answered:

> "reiterating the grounds of its previous challenge to the jurisdiction and asserting that the franchise ordinance rate was based upon a contract resulting from that ordinance and from the action taken at the time and in furtherance of the consolidation."

It appears, also, that the case was referred to a master to report on the facts and the law. The conclusion of the master with respect to the facts was,

> "The rate prescribed by the ordinance is insufficient, because of the changed conditions since the rate was fixed twenty years ago, to enable the company to earn a fair return; but I have reached the conclusion that to admit the contention of the company would be for

the court to exercise a power it does not possess; a rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, because of changed conditions."

It appears still further from the opinion that:

"no exception whatever to the report was made by the city, and the case therefore went to the court upon the admitted confiscatory character of the rate, upon the question of contract and upon the power of the court, if no such contract existed, to restrain the confiscation which would result from giving effect to the rate. Adhering to its previous ruling the court declared that it had jurisdiction to prevent the admitted confiscation which would result from the five cents rate. Concluding, however, that as the court was not a primary rate-making authority it would not fix a reasonable rate to replace the five cents rate the enforcement of which would be enjoined and expressing the hope that the parties might agree upon such a rate, it announced that it would postpone shaping the final decree for that purpose.

Some weeks afterward the final decree was entered. It enjoined the city from interfering with the complainant in substituting a seven cents fare for the five cents fare and besides enjoined the city from enforcing the various ordinances complained of in the bill prohibiting and punishing the charging of a higher rate than five cents. The decree reserved, however, the right to the city to ask relief whenever because of a change in conditions the five cents fare should cease to be confiscatory. In addition, the enforcement of the city ordinance imposing the half fare rate for school children was enjoined, although the continued enforcement of the state half-fare law, which

had been upheld in the Altgelt case, was expressly declared not to be restrained. On the direct appeal of the city because of the constitutional question involved, we are called upon, as at the outset stated, to determine whether error was committed in the decree thus rendered.

That in view of the admitted fact of confiscation the court had power to deal with the subject, we are of opinion is too clear for any thing but statement. And we think it is equally clear that as the right to regulate gave no power whatever to violate the constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five cents rate was a contract. That it was not and could not be, we are of opinion is the necessary result of the provision of section 17, Article I, of the state constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed this result is persuasively established by the ruling in the Altgelt case, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative and therefore to

cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

Finally, the court declared:

"The fact is, that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds, that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property."

Southern Electric Co. v. City of Chariton, Iowa, Electric Co. v. City of Fairfield, Muscatine Lighting Co. v. City of Muscatine, —— U. S. ——, decided April 11, 1921, were three suits begun against the cities with the object of preventing the enforcement of the maximum rates specified in certain ordinances, on the ground that such rates were so unreasonably low that their continued enforcement would deprive the corporations of remuneration for the services by them being performed and in fact, if enforced, would result in the confiscation of their property in violation of the due process of the 14th Amendment to the Constitution of the United States. In the three cases the court below granted a temporary injunction restraining the enforcement of the maximum rates and allowed an order permitting, pending the suits, a higher charge.

The cases were submitted upon the pleadings and without the taking of testimony upon issues which

presented the contention, that the ordinances were contracts and therefore the maximum rates which they fixed were susceptible of continued enforcement against the corporations although their operation would be confiscatory. Subsequently the pleadings were so amended as to directly present, separately from the other issues in the case, the right of the cities to enforce the ordinance rates in consequence of the contracts, without reference to whether such rates were in and of themselves confiscatory. Upon its opinion as to the existence of contracts and the power to make them as previously stated, the court entered decrees enforcing the ordinance rates which came before this court for review because of the constitutional question involved.

The court said:

> "Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations (citing cases); and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial (citing cases).
>
> It follows that as the rates here involved

> are conceded to be confiscatory they cannot be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it."

The court referred to the statute of Iowa forbidding any abridgment of the right to regulate and fix charges of service corporations, and after referring to the decisions of the Supreme Court of the state of Iowa to the effect that the fixing of maximum rates in a franchise ordinance is not a contract, said:

> "The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law" (citing cases).
>
> See also *City and County of Denks v. Stenger*, 277 Fed. 865.

Milwaukee Electric Ry. & L. Co. v. Railroad Commission, 153 Wis. 592, was an action to enjoin the commission from enforcing an order against the company whereby the right of the railway company to charge fares upon its railway system had been reduced below what it was contended had been previously fixed by an ordinance of the city of Milwaukee which it was alleged upon acceptance constituted an irrevocable contract between the company and the city.

The statute under which the original ordinances were authorized provided with respect to street railways as follows:

> "Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways, the use, upon such terms as the proper authorities shall determine, of any streets, parkways or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers * * *. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance from time to time prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway corporation or person to take the same; but in such respects are hereby confirmed" (see *Milwaukee Electric R. & L. Co. v. Railroad Com.*, 238 U. S. 174-179).

The chief justice of the Supreme Court of Wisconsin in his opinion said:

> "There is in fact but a single question, and that is whether the ordinances referred to in the statement of facts, so far as they specify the rates of fare which may be charged, constitute contracts which are protected by the state and federal Constitutions from impairment."

The chief justice further said:

> "In construing the meaning of the statute in question, certain fundamental considerations must be kept clearly in mind if we would reach correct and just conclusions, and some of the more important of these considerations will first be stated. The power to fix rates and tolls to be charged by public utilities is one of the attributes of sovereignty. With us this great power is vested in the legislature, and when the legislature speaks upon the subject its voice is controlling and supreme, unless indeed some constitutional guaranty is invaded."

The chief justice further said:

> "Clearly the legislature should not part with the power, even for a limited time, except upon the most potent and convincing considerations
>
> No presumption can be indulged that it has parted with the power, nor will doubtful words be construed as having that effect. He who asserts that the state has surrendered any part of its sovereign power even temporarily in his favor must prove the fact by the most convincing evidence. The presumptions, if any there be, must run the other way. If it were to be admitted for the purposes of the argument that

the legislature could by express language authorize municipal authorities to make contracts with public utilities fixing rates which should exist for definite periods in the future and be beyond legislative control during those periods (a proposition concerning which we intimate no opinion), the question here is whether such express language is to be found in Section 1862.

The section does not contain the word 'contract,' nor any words of similar import, except that the provision relating to the motive power provides that the cars shall be propelled by animals, or 'such other power as shall be agreed on.' The word 'grant' is, of course, a contract word, but the grant simply covers the right to the use of the streets; nothing else is specifically authorized to be 'granted.' This grant is to be upon 'terms'; not such terms as may be agreed on (as in the case of the motive power), but such terms as the municipal authorities 'shall determine.' Here clearly is language appropriate to the exercise of power by the municipal authorities, rather than to the making of a contract; to the imposition of commands by a superior power rather than to the reaching of a result by negotiation and agreement between equals.

Assuming that under this language a city might make a contract with a public utility, fixing rates or tolls for a definite period, which would bind the city itself and prevent any change of rates by the city authorities during the contract period, the question still remains whether the section can be construed as giving the city authorities any power to bargain away the sovereign right of the state to regulate fares and tolls and lower them, if found to be excessive. If this question were a new one in this state, we should entertain no doubt

> that it should be answered in the negative, but we do not regard it as new."

It was finally held that the statute did not empower the city to make any contract with the company fixing rates of fare which could not be changed by legislature or other legislative agency, and hence the ordinance which the company claimed to be irrevocable was not a contract protected from impairment by the state and federal Constitutions.

This case came before this court on a writ of error to the Supreme Court of the state of Wisconsin, 238 U. S. 174. The decree of the state court was affirmed and Mr. Justice Day, speaking for this court, said:

> "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed" (p. 180).

Knoxville Gas Co. v. City of Knoxville, 261 Fed. 283, was an action in which the company sought relief to prevent the city from interfering with the

company's exaction of an increase in the price of gas. It appears that the company was organized in March, 1903, to construct and operate gas works in the city of Knoxville. On the 8th day of September, 1903, the city adopted an ordinance in terms permitting the company the right to construct and operate gas works within the city for a period of fifty years. The ordinance required the company "to furnish gas of a given candle power to consumers within the city at a price not more than $1.10 per thousand cubic feet, less ten cents per thousand if paid by the 10th of each succeeding month of supply." The company until the filing of the bill in the case conformed its rates and charges to the maximum limit prescribed. In 1917, the date not appearing, the company petitioned the city to be allowed an increased rate for its gas. On March 5, 1918, the city adopted an ordinance forbidding under penalty any person or corporation supplying any article of public utility "to demand, accept or charge any unlawful rate or charge for a public utility article or service rendered or required to be rendered under its contract of franchise with the city of Knoxville to a consumer or patron." In the bill it was charged that owing to the increased costs brought about by the world war the rates fixed in the ordinance were inadequate and not compensatory and to force the company to continue to sell its gas at the ordinance rates would result in a taking of its property without due process of law, in violation of the Fourteenth Amendment. The bill was dismissed

in the court below. Warrington, circuit judge, after stating the facts, said:

> "The controlling question is whether in 1903 the city of Knoxville possessed the power by contract irrevocably to fix the maximum price of gas for a term of 50 years. If the city in reality had the power, the decree must be affirmed; for, in the first place, the rights and obligations in terms created under the ordinances of September, 1903, will not expire for over 30 years, and, in the next place, despite the complaint made of the world war conditions, it is not shown that performance of the ordinance provisions, taking all the years in contemplation together, 'will prove unremunerative.' *Columbus Railway, Power & Light Co. v. City of Columbus*, 249 U. S. 399, 414, 39 Sup. Ct. 349, 354 (63 L. Ed. 669), opinion by Mr. Justice Day.
>
> We assume that the passage of the ordinances by the city and their acceptance by the company in 1903 amounted to a binding contract between the parties as to all matters falling clearly within their respective corporate powers. In view, however, of the issue touching the price-fixing feature, it is necessary to consider whether the city could by contract of substantial duration and providing a maximum price for the supply of gas, bind the gas company, on the one hand, to accept this price in the face of intervening changes in conditions fairly calling for distinct increase in price, and commit the inhabitants of Knoxville and the municipality itself, on the other hand, to pay the price (for such quantities of gas as they might use) in spite of conditions obviously justifying material reduction in price. This is what the power claimed means; and the far-reaching consequences that well

might attend its execution, as respects both the consumer and the company, certainly demand the closest scrutiny into the disputed existence of the power.

The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by contract, resides primarily in the state—here, the state of Tennessee. Admittedly it is capable of being delegated by the legislative branch of a state to its municipalities. Efforts to define the power with precision, and to differentiate it from other municipal powers, have often been made under questions of whether it had in reality been delegated and rightly exercised; but they have failed to establish any rule of uniform acceptance and application. It is enough for present purposes to say that the character of the power is governmental, and that the consequent importance of conserving it is manifest; indeed, in the absence of specific provision to the contrary, it is to be interpreted as a power continuing in nature and incapable of being bartered away. Can it be safely said, then, that the state of Tennessee has both surrendered part of its own power and, in effect, authorized the city of Knoxville to exercise it by contract? The settled federal rule in respect of both these features is exacting, and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state."

The court further said:

"No legislative provision has come to our attention which expressly grants this power

to the city of Knoxville specially or to the municipalities generally. What is claimed is that, in virtue of certain charter and statutory provisions, the city was invested with power to control the streets, to grant franchises therein to public utility corporations, and to give consent to occupy the streets for gas purposes, either through original construction of a plant, or acquisition and use of an existing plant, upon such terms and conditions (not violative of any law) as it might impose, and that the right thus to make or refuse a grant, or to give or withhold consent, necessarily implies power to prescribe by ordinance as a condition, among others, of the grant or consent, a maximum price for a distinct term, which price and term upon the company's acceptance of the ordinance become part of a binding contract. It will be convenient, even at the expense of space, to set out the apposite portions of the statutes upon which the insistence of counsel is based; accordingly they are shown in the margin. It is to be observed of these provisions that, although the general assembly itself expressly authorized chartered gas companies to charge a reasonable price for gas, not exceeding the price allowed by existing charters or a maximum price therein definitely named, yet nothing distinctly reciprocal to this was vested in the cities. Authority to make prices by contract, or even by way of regulation, touching the supply of gas, is nowhere expressed among the municipal powers. Thus the claim of power in the city to agree upon a price for gas supplied throughout the life of the ordinances of 1903, must at last rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon

> language specifically authorizing it either to regulate prices or to agree upon a price. The effect of such a claim is to ask that there be read into the statutes language which the legislature did not see fit to enact."

The result was that the court held that neither the Knoxville charter nor any statute of Tennessee delegated to the city the power of the state to regulate rates to be charged by a public utility and that hence a franchise contract entered into between the complainant and the city fixing the rate could not in that respect be enforced by the city when by reason of changed conditions the rate fixed was not compensatory.

In *Central Power Co. v. City of Kearney*, 274 Fed. 253, the United States Circuit Court of Appeals for the Eighth Circuit held that assuming under a certain statute of Nebraska a city is authorized to contract with an electric light and power company concerning the rates to be charged, it could not make a contract precluding it from increasing or reducing the rates during the life of the contract in view of another section of the Nebraska statutes authorizing cities to regulate such rates and providing that such power shall not be abridged by ordinance, resolution or contract. It was further held as a contract between a Nebraska city and an electric light and power company providing for the construction of an electric light and power system and fixing maximum rates to be charged for twenty-five years was beyond the city's powers so far as it prohibited changes of rates

during the life of the contract, its provisions were unenforceable against the company for want of mutuality, and did not prevent an increase of rates.

In the *City of Moorhead* case (255 Fed. 920), cited by the learned judge in his memorandum, the court assumed that the city had the power to contract with respect to rates, for it said:

> "When cities are expressly vested with power to enter into contracts as to rates, it is now established by repeated decisions of the Supreme Court that such contracts are binding upon the city even though the public utility company may make extortionate profits therefrom" (p. 922).

No question as to the existence of the power of the city to make the contract as to rates was passed upon by Judge Amidon or involved in that case.

It has always been the policy of the state of Minnesota for the state to reserve at all times the power to fix compensation to be charged by public service corporations for their services.

Section 6137, General Statutes of Minnesota 1913, reads as follows:

> "The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation (that is public service corporations) and from time to time to fix the compensation which it may charge or receive for its services; and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality."

This provision is first found in Chapter 74 of

the Session Laws of Minnesota for the year 1893 and has been continuously on the statute books of the state ever since that date.

There is nothing in the Constitution of Minnesota permitting villages and cities to adopt home rule charters (Sec. 36, Art. 4, Const. Minn.) nor in the Enabling Act (Gen. Stat. Minn. 1913, Secs. 1343-1353) indicating any intention on the part of the legislature to surrender its power reserved by said Section 6137 to fix the rates to be charged by public service corporations.

Section 1347, Gen. Stat. Minn. 1913, being a part of the Enabling Act respecting the adoption of home rule charters, reads as follows:

> "Such proposed charter may provide for regulating and controlling the exercise of privileges and franchises in or upon the streets and other public places of the city, whether granted by the city or village, by the legislature or any other authority; but no perpetual franchise or privilege shall ever be created, nor shall any exclusive franchise or privilege be granted, unless the proposed grant be first submitted to the voters of the city or village, and be approved by a majority of those voting thereon, nor in such case for a period of more than twenty-five years."

This power so conferred upon cities and villages to regulate and control the exercise of privileges and franchises in or upon the streets and other public places of the city or village in no way deprives the state of the power reserved by Section 6137 to fix rates.

ANY IRREVOCABLE CONTRACT BETWEEN THE PARTIES TO THIS CAUSE FIXING GAS RATES FOR A TERM OF YEARS VIOLATES SECTION 33 OF ARTICLE IV OF THE CONSTITUTION OF THE STATE OF MINNESOTA.

Section 33 of Article IV of the Constitution of Minnesota, adopted November 8, 1881, and amended November 8, 1892, provides:

> "The legislature shall pass no local or special law * * * granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

The language of the amendment of 1881 is this:

> "The legislature is prohibited from enacting any special or private laws in the following cases * * *.
>
> 10th. For granting to any individual, association or corporation, except municipal, any special exclusive privilege, immunity or franchise whatever."
>
> See General Laws Minn., pp. 21, 22.

The record in this case, as hereinbefore shown, discloses that the charter of the defendant in force at the time the ordinance was passed and approved was created by an act of the legislature approved April 13, 1889, Sp. Laws Minn. 1889, Ch. 6.

It is axiomatic that the legislature could not confer upon the city of St. Cloud in 1889 any greater legislative power than it possessed itself; and that

whatever powers were conferred were at all times necessarily subject to all constitutional limitations.

Town of Woodbury v. Iowa Ry. & Light Co., 178 N. W. 549, 551.

Assuming for the purposes of the argument that defendant's charter was broad enough to confer upon the council the power to grant to complainant's predecessor an irrevocable contract to fix a specified rate for gas for a period of thirty years, the question is, could the legislature do that in view of the constitutional limitation referred to? We think not. We respectfully urge that it was so held in the San Antonio case *supra*.

In the District Court, Judge West said:

> "The power to 'regulate everything connected with city railroads' thus unrestricted would include authority to contract for and fix rates, were it not for the bar interposed by the provisions of Section 17 of the Bill of Rights of the Constitution of 1876, declaring that no irrevocable grant of special privilege or immunity could be made, but should be subject to legislative control. The grant of a right to a city railroad to charge a fixed sum as a passenger fare during the life of its franchise is an irrevocable grant of special privilege, expressly prohibited by the Constitution."
>
> 257 Fed. 469.

Upon appeal to this court, the late Chief Justice in considering the question as to whether the ordinance of 1889 fixing the five cent rate was a contract, said:

> "That it was not and could not be, we are

of opinion is the necessary result of the provision of Section 17, Article I, of the State Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed this result is persuasively established by the ruling in the Altgelt case, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

City of San Antonio v. San Antonio Public Service Co., —— U. S. ——.

The power of a municipality to fix the rates to be charged by a public service corporation is embraced within its governmental and legislative powers as contradistinguished from its business or proprietary powers.

3 *Dillon Mun. Corp.* (5th Ed.), Sec. 1325.

Home Telephone Co. v. City of Los Angeles, 211 U. S. 265.

Rogers Park Water Co. v. Fergus, 180 U. S. 624.

Knoxville Gas Co. v. City of Knoxville, 261 Fed. 283.

Milwaukee Electric Railway & Light Co. v. Railroad Com., 238 U. S. 174.

THE CASES CITED BY THE LEARNED DISTRICT JUDGE TO SUSTAIN HIS CONCLUSION THAT THE RATES TO BE CHARGED FOR ALL GAS AUTHORIZED TO BE SOLD BY THE COMPLAINANT ARE FIXED FOR THE LIFE OF THE ORDINANCE ARE NOT IN OUR JUDGMENT IN POINT. NO QUESTION OF LEGISLATIVE OR GOVERNMENTAL POWER—ITS EXERCISE OR SURRENDER—WAS INVOLVED IN ANY OF THEM. EACH INVOLVED ONLY THE PURCHASE BY THE CITY ITSELF OF A COMMODITY TO BE USED BY IT FOR ITS OWN BENEFICIAL PURPOSE.

In *Flynn v. Little Falls Electric & Water Co.*, 74 Minn. 180 (cited by the District Judge) it was held that the common council of the city of Little Falls had authority to make a time contract with the Water Company to pay an agreed price for a specified number of hydrants to supply water for fire protection, provided the length of time the contract was to run was reasonable; and that a thirty-year period was an unreasonable length of time and that a tax-payer might maintain an action to restrain the common council from paying out money on such void contract.

In *Fergus Falls Water Co. v. City of Fergus Falls*, 65 Fed. 586 (a case cited by the District Judge), it was held that where a city with a population of five thousand and an assessed valuation of

property of two and a quarter million dollars contracts with a person giving him the exclusive privilege of laying water mains in the city for thirty years and providing that he shall furnish the city with fifty fire hydrants for a specified rental per year for the thirty years with a stipulation that, at the end of ten years, it may, at its option, buy the waterworks, the contract will not after the city has enjoyed the benefit of it for over ten years be held so unreasonably oppressive or contrary to public policy as to be void; and that where power has been given a city by its charter to contract for waterworks it has power to make necessary and proper arrangements to provide for payment of the same.

In *Anoka Water Works, etc., Co. v. City of Anoka*, 109 Fed. 580 (a case cited by the District Judge), it was held that where a city has power under its charter to provide for furnishing water and light to the city and its inhabitants and to control the erection of works for such purposes, has the power to contract for the furnishing of water and light by third parties and to grant the franchises and privileges necessary to carry out such contracts; and that it may agree to pay a stipulated sum to the grantees each six months for water and light for public use during a term of years, where such contracts are reasonable.

The court in its opinion, after referring to the provision in the city charter authorizing it to provide for and conduct water into and through the streets, alleys and public grounds of the city and to

provide for and control the erection of waterworks for the supply of water for the city said:

> "Under these powers, and in the performance of the duties incident to such powers, the city might either construct waterworks * * * and operate the same, or it might contract for the supply of water and light; granting to the contractor such franchises as might be necessary or convenient for the construction and operation of the works for the supply of water and light (citing cases). The admitted facts show that these works were necessary, and were generally desired by the inhabitants of the city, when contracted for, as conducive to their health and comfort" (p. 582).

The learned judge in his memorandum (pp. 159-160) cited the case of *Reed v. City of Anoka*, 85 Minn. 294, and quoted at length from the opinion in that case. He then said (p. 160):

> "The parallelism between the Reed case and the case at bar is striking. The charter provisions are essentially the same as to the powers of the cities. The ordinance provisions are essentially the same as to the grant of franchises, as to a long time period and as to a maximum charge for service. The Reed case in my judgment is conclusive as to the construction to be placed upon the charter of the defendant city and its power to make the contract in question; also as to the construction to be placed upon the maximum rate provision contained in the contractual franchise ordinance."

We fail to see the slightest similarity between the two cases. The Reed case was an action brought by a tax-payer in his own behalf and in

behalf of others to have the franchise contracts cancelled and the city restrained from carrying them out. In its opinion the Supreme Court of Minnesota said:

> "The authority under which the city acted in entering into the contracts is found in the provisions of its charter, which, among other things, confer upon the municipality, in substance: (a) Power to make and establish public pumps, wells, cisterns and hydrants, and to provide for and control the erection of waterworks for the supply of water for the city and its inhabitants; (b) power to provide for lighting the city with electricity, gas, or other means, and to control the erection of any works for that purpose, and to grant to any corporation or person the right to occupy its streets for that purpose. There can be no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water, and for the purpose of lighting the city. Authorities sustaining the proposition, under similar charter provisions, are numerous: *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 60, 61 Fed. 782; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 88 Fed. 720; *City v. Newport*, 84 Ky. 166; *City v. Indianapolis*, 66 Ind. 396."

The court then went on to say that the contention made was that the contracts were void on their face because and for the reason that they cover a term of thirty-one years and definitely and finally fix and determine the rates of compensation to be paid the grantees for the full period and thus in effect barter and contract away legis-

lative functions of the municipality. An examination of the case will show that the question involved was as to the power of the city to contract for the period mentioned, thirty-one years, for a certain number of hydrants at a rate of $64.00 per year. The Supreme Court of Minnesota then said:

> "The authorities are very uniform that contracts of this nature are not within the legislative or governmental prerogatives of the municipality, *but rather within its proprietary or business powers. Their purpose is not to govern the inhabitants*, but to secure for them and for itself a private benefit. *Illinois Trust & Sav. Bank Co. v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77. It was so held in the case of *Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106. While this precise point of distinction was not made in that case, it is authority for the proposition that a municipality *does not exercise its legislative functions in entering into contracts of* this kind, but only *its business or proprietary powers*, to which *the rules and principles of law applicable to contracts and transactions between individuals apply.* It would be extremely illogical to hold that such contracts could be lawfully made and entered into, provided they did not extend in duration beyond the term of office of the council by which they are made, and would tend to render the exercise of the power by municipalities practically valueless" (italics ours).

It will, therefore, be observed that the opinion in this case sustains the contention contained in

our caption that the powers involved in all of the cases cited by the learned judge did not arise under any legislative or governmental power, but under the city's business or proprietary right to make and enter into commercial contracts of purchase of water and electricity for its own use. It is to be further noted that the court in the Reed case very clearly points out the distinction between the legislative or governmental powers of a city and its business or proprietary powers.

The question presented in the cases cited by the learned judge below are thus discussed by Judge Dillon as follows:

> "When a city has statutory authority to enter into contracts for a supply of water and gas for its own use and for the use of its inhabitants, the *manner* in which its statutory power shall be exercised and the terms of any contract which it may enter into, including the *number of years during which it is to continue,* rest within the *discretion* of the municipal authorities; and the courts will not review it or set it aside in the absence of fraud or an abuse or excess of authority, or unless the contract is so unreasonable, inequitable, or unfair as to justify the interference of a court on the established principles of law or equity. In the absence of charter or statute provision there is no rule of law which requires the municipal authorities to confine the exercise of their discretion in contracting for water or light to the *term of office* of the council or other officers making the contract; or to a contract for a single fiscal or calendar year. It has been said that the courts look with disfavor upon contracts involving the

payment of moneys extending over a long period of time as tending to create a monopoly and involving undue restraint of the legislative powers of the successors of municipal boards and officers. But the great weight of authority clealy recognizes the validity of such contracts when they are not *ultra vires*, and they will not be disturbed if it appears that at the time when the contract was entered into it was fair and reasonable and warranted by the necessities of the case, or was then advantageous to the municipality. The decisions do not disclose that there is any *stated term* which the courts will regard as so unreasonable as to be an unfair and unreasonable exercise of the discretionary powers of the municipality. If, however, it appears that the contract is unreasonable, inequitable, and unfair, e. g., if it be shown that at the time when the contract was made the city did not, and will not for many years to come, require the hydrants or lights called for by the contract, or that the price agreed to be paid by the city for each hydrant or light is unreasonable and exorbitant, and more than the reasonable value thereof, or that the effect of the contract is to result in appropriating to its purposes the entire present income of the city, leaving nothing for other present, or so far as can be seen, for other future needs, or that the natural effect of the contract is to create a monopoly during a long term of years, the contract so made will be regarded as an improper exercise of the power to contract conferred upon the city council, and it will be set aside by the courts." 3 *Dillon Mun. Corp.* (5th ed.), Sec. 1307. In the note to this section three of the cases cited by the learned judge in the court below are referred to, viz., *Flynn v. Little Falls Elec. & W. Co.*, 74 Minn.

180; *Reed v. Anoka*, 85 Minn. 294, and *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. 586.

To sum up on this branch of the case it is apparent that purchases by a city of water, fuel, light, power and the like to enable it to carry on and discharge its proper functions are not at all like the surrender or bartering away of legislative power to fix rates for gas to the end that charges to consumers shall not be excessive or unequal. In determining the question of *ultra vires* courts will readily infer the power of a city to make purchases of the character above referred to. On the other hand the power to surrender the sovereign power of the state to fix rates to be charged by a public utility will never be inferred. The grant by the state of that power to a city must be expressly conferred in plain, clear, unequivocal and unmistakable language. Both rules rest upon sound public policy.

UNDER SECTION 6 OF THE FRANCHISE ORDINANCE THE GRANTEE IS NOT BOUND TO FURNISH GAS AT THE RATES THEREIN SPECIFIED, NOR IS THERE ANYTHING THEREIN TO INDICATE THAT THE GRANTEE EVER SURRENDERED ITS CONSTITUTIONAL RIGHT TO HAVE JUST COMPENSATION.

(a) The language in Section 6 of the ordinance does not purport to make a contract; it is not contractual in form but is declaratory and legis-

lative in form—

> "The grantee * * * is authorized hereby to sell illuminating gas of a standard of fourteen candle power, at the price of not to exceed one and 85/100 dollars ($1.85) per thousand cubic feet and fuel gas at not to exceed one and 35/100 dollars ($1.35) per thousand cubic feet, and the grantee shall be *at liberty* to cut off the supply from any person failing or refusing to pay for gas furnished for a period of thirty days" (p. 3).

The purpose of the rate provision in Section 6 was to exercise the legislative power reserved to the city for the establishment of reasonable rates, so that "when the works therefor shall have been completed," the consumers and the company would be advised of the maximum rates permitted to be charged for gas of the new standard produced and distributed by the new plant; to bind the consumers to pay rates charged by the company up to the maximum; to free consumers and the company from danger and expenses of litigation as to reasonableness of rates charged—a question always open in the absence of authoritative regulation—and also to leave the city free to fix higher or lower rates in the proper exercise of its legislative authority, and to leave unimpaired to the company its right to have just compensation for the use of its property and for the services rendered—a right safeguarded to it by the Constitution.

That the provision of Section 6 as to rates is legislative and not contractual, is also evidenced

by the provision authorizing the company to cut off the supply of gas for non-payment of bills. As to rates, it is said, "The grantee is authorized," etc., and as to cutting off the supply it is said, "The grantee shall be at liberty to cut off the supply," etc. Probably no one will claim that the latter is contractual or that the company is bound or limited thereby to that remedy. The words with reference to rates and those with reference to cutting off the supply are substantial equivalents.

Again, the language in Section 6 as to rates does not express or imply any period of time during which the prescribed maximums shall continue to be charged. The language is, "The grantee is authorized hereby to sell illuminating gas *when the works therefor shall have been completed*," of the specified standard, within specified maximum prices. This language merely fixes the time when the right of the company to make such charges shall commence. When the ordinance was passed the company had an old gas plant then furnishing gas. In that paragraph it bound itself until the completion of the new plant to furnish gas from the old works. Plainly, it was the purpose of the rate provision in Section 6 to prescribe maximum rates to take effect (with no provision as to duration) when the works were completed.

(b) Paragraph 5 contains a contractual provision—mark the language:

> "The grantee hereby covenants and agrees that it will, prior to the first day of January, 1907, erect * * * an efficient coal gas

generating plant or system of ample capacity, and *after the erection* shall manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power, and in the meantime will furnish gas from the present gas works of the grantee of the standard *now* manufactured therein" (p. 3).

This section is contractual in form. The company agrees to build a new plant; after completion thereof to furnish gas of at least fourteen candle power, and in the meantime to furnish gas from the old works of the then present standard.

Manifestly, if it had been intended by the parties to contract with reference to rates for the term of the franchise, or for any other period, they would have clearly so stated in this section.

No language having any contractual purpose or effect is found in paragraph 6. The change of form is from contractual, used in Section 5, to legislative, used in Section 6. Under the city charter the council had power to provide for and control the erection of gas works. This included power to bind the company by contract to build the plant and to serve the public with gas. But there is no such charter power with respect to rates. The ordinance in harmony with the city's charter power employs language in Section 6, with respect to rates, indicating the legislative purpose to regulate and prescribe rates, not to contract with reference to them.

(c) In Section 7 it is provided:

"The rights hereby granted are *upon the*

> *express condition* that the city of St. Cloud may purchase the electric and gas works of the grantee on the first day of January, 1911," etc. (p. 4).

There is no similar or equivalent language in Section 6, or elsewhere, with respect to rates. The failure to similarly provide with respect to rates is significant. It shows absence of intention to contract as to rates.

If the parties intended that the company at no time during the thirty years of life of the franchise, under no circumstances whatever, should ever charge more than $1.35 per M. for fuel gas, we rightly would expect to find evidence of such an extraordinary purpose. But the language employed—especially when viewed in connection with the other provisions of the ordinance—is the strongest evidence that the parties had no such intention or purpose.

An inviolable constitutional right will not be deemed to have been surrendered lightly or by mere implication. The same strict rule should be applied to protect the company in its constitutional right to have just compensation for its property used and services rendered, as is usually invoked to protect the public (in cases where power to contract is given a city) against a surrender of the power to prescribe and regulate rates. The same reasons apply in both cases. Plain, unambiguous provisions are required to effect a surrender by a city of its power to regulate or to effect a surrender by a public service company of its constitu-

tional safeguard against confiscation.

It is plain that neither the city nor the company is bound by contract with respect to rates to be charged for gas. The city could not surrender its power and did not attempt to do so. It may now—within the limitations of the constitutional protection enjoyed by the company—prescribe rates higher or lower than those specified in Section 6. There is nothing in the language contained in the franchise ordinance, or in the circumstances of its enactment, which furnishes any support for the contention that the company is bound to furnish gas at the prescribed rates, if it can be shown that the same are too low and confiscatory.

A MOTION TO DISMISS A BILL IN EQUITY ADMITS ALL THE ALLEGATIONS OF THE BILL WHICH ARE WELL PLEADED.

Johnson v. M. & St. P. Ry. Co., 224 Fed. 160.

Fordham v. Hicks, 224 Fed. 810.

Lowenthal v. Georgia Coast & R. R. Co., 233 Fed. 1010.

Hosler v. Ireland, 219 Fed. 490.

San Antonio Public Service Co. v. City of San Antonio, 257 Fed. 467.

The bill in this case clearly alleges a confiscation of complainant's gas property within the prohibition of the 14th Amendment.

The learned judge in the court below clearly so held by sustaining the jurisdiction of the court. He said:

> "Upon consideration of the allegations contained in the present complaint, I am of the opinion that questions are presented by the complaint which arise under the Fourteenth Amendment to the Federal Constitution and that those questions are not so wholly lacking in merit as to afford no basis for jurisdiction" (p. 147).

That he was impressed with the inadequacy and the non-compensatory character of complainant's gas rates is further shown by his quotation from the opinion in the Moorhead case, *supra*, where Judge Amidon said:

> "The situation disclosed by the cross-bill if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract" (p. 161).

Briefly, the bill shows that complainant's gas property cost up to August 31, 1920, $194,057.03, and that its present value is in excess of $440,000 (p. 6).

It is specifically alleged (and the earnings are shown on pages 7 and 8 of the record) that the ordinance rates have not been adequate or sufficient to pay complainant's necessary operating expenses and yield a fair or reasonable return on the fair value of the property devoted to public use. The bill also alleges operating deficits from the year ending December 31, 1917 (p. 8). So that it is perfectly clear that the bill challenges the maximum ordinance rates as being non-compensatory and

confiscatory and in violation of the Fourteenth Amendment.

For the reasons hereinbefore given we respectfully urge that the decree of the court below should be reversed.

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APPELLANT'S REPLY BRIEF

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 472. 10

ST. CLOUD PUBLIC SERVICE COMPANY,
Appellant,

vs.

CITY OF ST. CLOUD.
Appellee.

Appellant's Reply Brief.

J. O. P. WHEELWRIGHT,
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Appellant,

vs.

CITY OF ST. CLOUD.

Appellee.

Appellant's Reply Brief.

In our original brief we attempted to sustain the following propositions:

1. While the city charter of the City of St. Cloud conferred upon its common council authority to regulate and prescribe the fees, rates and charges of public utilities, it did not provide that the council might contract or agree with respect to such fees, rates and charges; and hence it follows that it had no power to enter into a contract fixing unalterably during the term of the franchise granted by Ordinance 160, charges for gas service and thereby disabling itself from exercising the charter power of regulation.

2. The power of a municipality to fix the rates to be charged by a public service corporation is embraced within its governmental and legislative

powers as contradistinguished from its business or proprietary powers.

3. The surrender by contract, of a power of government, is a very grave act, and the surrender itself, as well as the authority to make it must clearly and unmistakably appear. Specific authority is required.

4. That any irrevocable contract between the parties to this cause fixing gas rates for a term of years violates that section of the Constitution of the state of Minnesota prohibiting the granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

Opelika Sewer Co. v. The City of Opelika, 280 Fed. 155.

City of New Orleans v. O'Keefe, 280 Fed. 92.

These cases were not cited in our original brief.

5. That there is nothing in Section 6 of the franchise ordinance requiring the grantee to furnish gas at the rates therein specified, nor is there anything therein to indicate that the grantee ever surrendered its constitutional right to have just compensation.

Counsel having cited *Vicksburg v. Vicksburg Water Works Company*, 206 U. S. 497; *City of Cleveland v. Cleveland City Railway Company; Milwaukee Electric Company v. Railroad Commission of Wisconsin*, 238 U. S. 174. The distinction between these cases and the one at bar is clearly pointed out in the *Home Telephone Company* case

(211 U. S. 215), cited on page 20 of our original brief.

The case of *Columbus Railway, Power & Light Company v. City of Columbus* (249 U. S. 399), is also cited. But the court clearly points out that it was controlled by *Cleveland City Railway Company v. City of Cleveland, supra.* In *Milwaukee Electric Light Company v. Railroad Commission* (238 U. S. 174), this court felt compelled to follow the construction given to a Wisconsin statute by the highest court of that state.

Cedar Rapids Gas Light Co. v. Cedar Rapids (233 U. S. 667), is also cited by appellee. In that case the court below recognized that the act of a municipality in fixing rates was purely legislative, but that rates could not be so fixed as to fail to afford fair compensation for the services rendered. But it found upon the merits that it could not be said that the ordinance rate complained of failed to meet the requirements of the Constitution, declaring that if upon a fair trial and test the rate should be found not to be remunerative a remedy would be applied. So that this court in affirming the decree of the Iowa Supreme Court had no occasion to consider or pass upon the question involved herein. Counsel also cites *Knoxville Gas Company v. City of Knoxville* (261 Fed. 283). That case was cited by us in our original brief because it held that neither the Knoxville charter nor any statute of Tennessee delegated to the city the power of the state to regulate rates to be charged by a public utility, and hence a franchise contract en-

tered into between the complainant and the city fixing the rate could not in that respect be enforced by the city, when by reason of changed conditions the rate fixed was not compensatory.

The gross earnings referred to by the appellee on page 2 of its brief include those derived by complainant from the operation of its electric plant as well as those derived from the operation of its gas plant.

In fixing the price of gas complainant is not entitled to recoup its losses upon sales of electricity.

Municipal Gas Co. v. Public Service Commission, 121 N. E. 772.

For the reasons herein stated we again respectfully urge that the decree appealed from should be reversed.

J. O. P. WHEELWRIGHT,
Attorney and Solicitor for Appellant.